

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>MARK DEPRIEST</b>	)	
Claimant	)	
V.	)	
	)	
<b>STAFF MANAGEMENT SMX</b>	)	Docket No. 1,073,775
Respondent	)	
AND	)	
	)	
<b>NEW HAMPSHIRE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant appealed the December 31, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Christopher D. Werner of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 16, 2015, preliminary hearing and exhibits thereto; the transcript of the June 29, 2015, preliminary hearing and exhibits thereto; the December 22, 2015, letter from Dr. Harold A. Hess; the December 17, 2015, addendum to independent medical evaluation from Dr. Terrence Pratt; and all pleadings contained in the administrative file.

**ISSUES**

The ALJ found claimant sustained personal injury by accident when he fell from a chair at work on April 11, 2015. The ALJ, however, denied benefits because claimant's fall from the chair solely aggravated his preexisting back condition. Claimant asserts he suffered new disc herniations and, therefore, his accidental work injury is compensable. Respondent asks that the December 31, 2015, preliminary hearing Order be affirmed.

The issue is: did claimant sustain personal injury by accident on April 11, 2015, arising out of and in the course of his employment?

**FINDINGS OF FACT**

Claimant began working for respondent, a temporary agency, on Saturday, April 11, 2015. Claimant was assigned to work that day on Procter & Gamble's dishwashing liquid production line. About two hours after he began working, a break ensued because the production line was down. During the break, claimant sat on what he described as an unstable office chair with wheels on it and the chair rolled out from under him. According to claimant, he fell to the floor striking his lower back and buttocks and felt pain. He testified the chair on which he sat was less than 10 feet from the production line and there were several other rolling chairs 10 to 15 feet from the production line. Claimant testified a manager for Procter & Gamble, Frank Belt, was 10 to 20 feet away and observed claimant fall, but did not ask if he was hurt, needed to see a doctor or wanted to file a claim. Mr. Belt did not testify. Claimant averred that 30 minutes after his accident, another employee also fell from a rolling chair.

A day or two prior to his accident, claimant underwent extensive safety orientation. He denied being told he was not supposed to have rolling chairs on the production line floor.

Claimant did not immediately report the accidental injury. He became concerned the next day, Sunday, as his pain was excruciating. Claimant indicated that since work was canceled for Sunday, he reported his injury the following day, Monday. He reported his injury to the person who recruited him to work for respondent. That person is located outside the plant where claimant worked and indicated he needed to contact Ruth Cheshier because she was the only person to whom he could report the accident. Claimant testified he constantly tried calling and texting Ms. Cheshier's telephone number the Monday after the accident and was unable to get a response.

Unable to contact Ms. Cheshier, claimant, on the Tuesday following the accident, went to the emergency room at Providence Medical Center (Providence) and was admitted for three and one-half days. Providence's medical records indicated claimant sought treatment on April 14, 2015. Claimant reported injuring his back when he fell from a chair at work. Lumbar spine x-rays showed no acute lumbar spine abnormality and sacrococcygeal spine x-rays revealed no fracture or bony abnormality and the presacral soft issues were unremarkable. An April 15 MRI revealed: (1) a broad-based disc protrusion at L5-S1 causing moderate central spinal stenosis and osteophytic encroachment of the neural foramina causing severe bilateral foraminal stenosis and (2) a broad-based disc bulge at L4-5 causing moderate central stenosis and osteophytic encroachment of the foramen causing moderate bilateral foraminal stenosis.

Claimant was evaluated on April 15 by Dr. Frank P. Holladay, whom claimant indicated was a surgeon. Dr. Holladay's notes indicated claimant reported having chronic neck pain and denied any significant problems with his lower back in the past.

Dr. Holladay assessed claimant with lumbar spinal stenosis and that claimant's fall acutely exacerbated his lower back problems.

On April 16, claimant was evaluated by Dr. Brian N. Jones. Claimant reported having prior chronic neck pain and some low back pain. Dr. Jones reviewed claimant's MRI and provided a lumbar epidural steroid injection. According to claimant, approximately two weeks after being released from Providence, he returned there because of severe back pain.

Claimant acknowledged that prior to his fall, he hurt his lower back several times, but averred they were merely muscle strains and soft tissue injuries. Claimant testified the pain from his 2015 work injury is nothing like he ever previously experienced. Claimant testified his back bothers him whether he is sitting or standing and noted he was almost 50 years old. He acknowledged having low back work injuries in 1990, 1994, 2000, March and December 2006, and 2008, but indicated they were all soft tissue injuries or muscle strains, not serious injuries. He testified:

Q. . . . And out of those 21 prior [work] accidents, at least nine of them involve your low back; is that correct?

A. I'm not certain of the exact numbers, but a lot of them were back strains, yes.<sup>1</sup>

Ruth Cheshier, safety manager for respondent, investigated claimant's accident. Ms. Cheshier's office is located in Proctor & Gamble's plant. She interviewed Mr. Belt, Proctor & Gamble's line technician, who stated only a flat folding chair was on the production line and that no one reported an incident, fall or injury during claimant's April 11 shift. Mr. Belt indicated he works only 15 feet from claimant's production line. Ms. Cheshier testified there were two rolling chairs on the line, used by the supervisor and line technician. One folding chair sits on a rubber mat near the production line. Other rolling chairs were in offices, but claimant did not have access to them. Ms. Cheshier indicated that no other worker fell out of a rolling chair during the shift when claimant alleged he was injured.

Ms. Cheshier testified that during orientation, claimant was told he was not supposed to sit on a rolling chair if one was present. He was also given three telephone numbers in his orientation packet he could call if he had an accident. She testified none of the numbers were called by claimant. She admitted not being present during claimant's orientation.

Ms. Cheshier indicated claimant reported his accident to his recruiter on the Tuesday after his accident, a violation of respondent's policy that employees report a work

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<sup>1</sup> P.H. Trans. (Dec. 16, 2015) at 12.

accident within 24 hours. Rachel at the recruiting office informed Ms. Cheshier of claimant's alleged accident. Ms. Cheshier then called claimant and left a message on his answering machine. The same day, Ms Cheshier received a text from claimant that he got her message, he needed medical attention and for Ms. Cheshier to call him. After receiving claimant's text, Ms. Cheshier again called claimant and left a message on his answering machine. She first talked with claimant on the Thursday after his accident. She also testified that on the Tuesday after claimant's accident, he returned to the recruiting office and told Ryan Davis of his accidental injury. Mr. Davis reported claimant had no flexibility and movement issues and bent down to show his range of motion to his toes.

A letter was placed in the record from Procter & Gamble to OSHA responding to a complaint of unstable rolling chairs in the production area and an incident on April 11, 2015, wherein an employee fell from a chair and allegedly herniated two discs. The letter indicated there were two wheeled chairs, but those were used by the line operator and contractor supervisor and not for breaks. The letter indicated there were rolling chairs in the offices, but none in the employee break room. All the rolling chairs in the building were inspected and none were found to be defective.

Respondent introduced numerous employer's reports of accident involving claimant, of which several were for low back injuries. Also placed into evidence were nine workers compensation settlement hearing transcripts, of which three, and possibly four, were for low back injuries. When claimant settled a claim for an April 26, 1990, back injury, the report of Dr. Nathan Schechter was made an exhibit. Dr. Shechter opined claimant had musculoligamentous injuries to the low back as a result of repetitive bending and stooping and had a 5 percent whole person functional impairment.

At a settlement hearing for a June 5, 1995, low back injury, Dr. Michael J. Poppa's records indicated claimant had a work-related musculoligamentous lumbar sprain/strain and using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (3rd ed. revised), imposed a 7 percent whole person functional impairment. Dr. Jeffrey T. MacMillan's impression was back pain and he indicated claimant had no functional impairment.

Claimant settled a claim for what he testified were cervical spine and upper back injuries sustained in a December 9, 2006, accident. Dr. Fernando M. Egea's report attached to the settlement hearing transcript indicated claimant injured his cervical spine and lower back. The doctor opined claimant suffered from cervical myofascitis with chronic myofascial pain and radiculopathy, as well as lumbar myofascitis with chronic myofascial pain. He provided a 20 percent whole person functional impairment for claimant's lumbar and cervical injuries.

At a March 11, 2009, settlement hearing for a May 12, 2008, low back injury, Dr. Douglas M. Rope's report was placed into the record. The doctor's impression was work-site trauma with left-sided sacroiliac discomfort and questionable radicular lumbar

paraspinal discomfort. Using the *Guides*,<sup>2</sup> Dr. Rope assigned a 4 percent whole person functional impairment for claimant's sacral injury and a 5 percent whole person functional impairment for minor impairment of the lumbar spine. Dr. Terrence Pratt's December 15, 2008, diagnosis was low back pain with a history of sacral contusion. The doctor noted claimant's prior impairment ratings and opined claimant sustained a 2 percent whole person impairment resulting from the accident that gave rise to the settlement.

Claimant sustained a work-related left knee injury on May 28, 2014, and settled his claim in December 2014. Dr. Lowry Jones' report attached to the settlement hearing transcript noted claimant had bilateral knee and low back symptoms. Claimant reported his back hurt from sitting and doing paperwork.

At the request of his attorney, claimant was evaluated on August 19, 2015, by neurosurgeon Dr. Harold A. Hess, who reviewed claimant's April 15, 2015, MRI and was aware of claimant's history of low back pain. The doctor's impression was right lumbar radiculopathy secondary to broad-based L4-5 and L5-S1 disc protrusions causing both central and bilateral foraminal stenosis. Dr. Hess indicated that on January 8, 2015, claimant injured his back and Concentra diagnosed lumbar strain and radiculopathy. Claimant reported the pain dissipated without treatment within two months. Claimant reported that with all his prior low back injuries, the pain never completely radiated down the right leg into the foot. The doctor opined, "With his symptoms being new pain completely down the right leg to his foot, it would be my opinion, within a reasonable degree of medical certainty, that the work-related injury of April 11, 2015 is the prevailing factor in causing this patient's current medical condition and his current symptoms."<sup>3</sup>

Dr. Pratt evaluated claimant on November 12, 2015, and issued a report, which is dated that same day. He, too, noted claimant's extensive history of prior work-related low back injuries. Dr. Pratt reviewed claimant's post-April 11, 2015, medical records including Dr. Hess' report and claimant's MRI. The doctor diagnosed claimant with low back pain and discogenic changes at the lower lumbar to upper sacral region with degenerative changes as well as reported disk protrusions. Dr. Pratt later reviewed records of five of claimant's settlement hearings and wrote an addendum on December 17, 2015. The doctor indicated his diagnosis had not changed. Dr. Pratt opined:

With preexisting right lower extremity radicular-type symptoms, I could not state to a reasonable degree of medical certainty that his more recent even[t] in April 2015 resulted in his symptoms. He had aggravation of his underlying involvement or a triggering event. I do not have prior MRI assessments to compare and would be happy to do that but the records document long-term lumbosacral involvement with

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>3</sup> P.H. Trans. (Dec. 16, 2015), Cl. Ex. 1 at 3.

prior complaint of radicular-type symptoms. He also reports multiple additional areas of involvement unrelated to the 2015 event.<sup>4</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>5</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>6</sup>

The ALJ found claimant proved by a preponderance of the evidence that an accident occurred, but that claimant’s accident solely aggravated a preexisting condition and, therefore, is not compensable. This Board Member affirms the ALJ’s finding that claimant’s accidental work injury is not compensable, but does so for a different reason.

Claimant asserts he fell off a rolling chair within two hours after commencing work for respondent. Claimant testified his accident was witnessed by Mr. Belt and that 30 minutes after he fell, another worker fell off a rolling chair. Ms. Cheshier interviewed Mr. Belt and he indicated there were no accidents during his shift. Ms. Cheshier’s investigation revealed rolling chairs were not allowed near the production line for safety reasons, but two rolling chairs were used by Mr. Belt and another individual. All other rolling chairs were in offices and claimant did not have access to them. In a reply to an OSHA complaint, Procter & Gamble provided similar information.

Claimant is proficient in filing workers compensation claims. The record includes nine settlement hearing transcripts and numerous employer’s reports of accident. Claimant has settled at least three claims for low back soft-tissue injuries. Claimant is not credible, given the circumstances of his alleged accident. Simply put, claimant failed to prove by a preponderance of the credible evidence that he sustained personal injury by accident on April 11, 2015.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> This review has been determined

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<sup>4</sup> Pratt Addendum (Dec. 17, 2015) at 2.

<sup>5</sup> K.S.A. 2014 Supp. 44-501b(c).

<sup>6</sup> K.S.A. 2014 Supp. 44-508(h).

<sup>7</sup> K.S.A. 2014 Supp. 44-534a.

by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>8</sup>

**WHEREFORE**, the undersigned Board Member affirms the December 31, 2015, preliminary hearing Order entered by ALJ Hursh denying claimant workers compensation benefits, although for a different reason.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2016.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

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<sup>8</sup> K.S.A. 2014 Supp. 44-555c(j).